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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 146 Misc.

T. W. WADE and JERRY WADE, by next friend,
Petitioners,
vs.
CONASAUGA RIVER LUMBER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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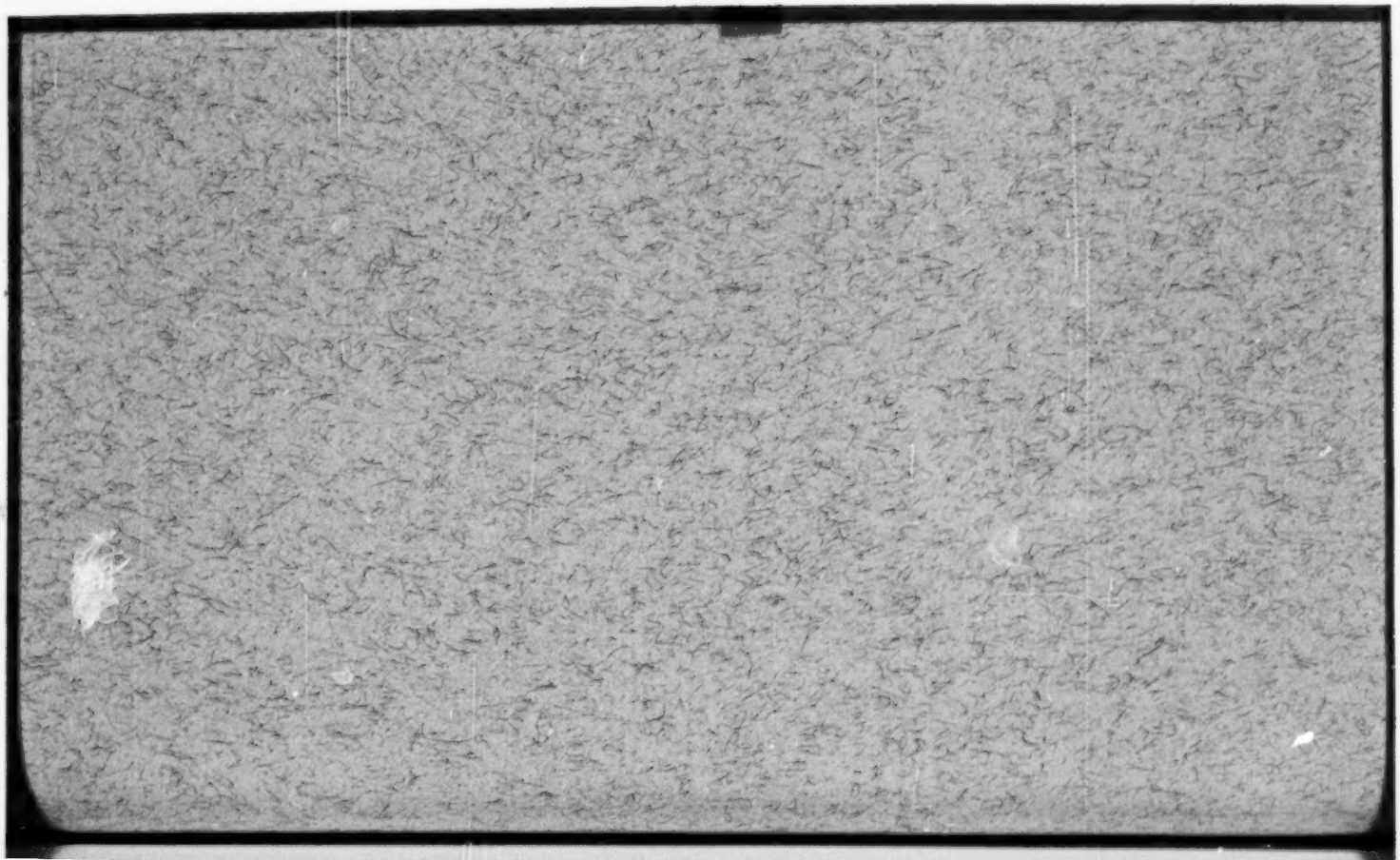

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

ADDITIONAL RULES WHICH THE CASE INVOLVES.

Rule 19 of the *Revised Rules of the Supreme Court of the United States,* following Title 28, USCA:

"Considerations governing review on certiorari:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an im-

portant state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

Rule 50(b) of the *Federal Rules of Civil Procedure*, following Title 28, USCA:

"Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been di-

rected. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

STATEMENT OF THE CASE.

I. LEGAL PROCEEDINGS.

The petition for writ of certiorari fails to mention that a motion for a directed verdict on behalf of the defendant below (Respondent here) was made and denied before the case was given to the jury (R. 79a), and that such motion was seasonably renewed after the verdict (R. 1a, 2a, 4a, 5a, 124a). (Unless indicated to the contrary hereafter, Record references as shown by the letter "R" refer to the Appendix to Brief of Appellant in the United States Court of Appeals, which Appendix constitutes the major part of the certified record on petition for writ of certiorari.)

II. STATEMENT OF FACTS.

On July 5, 1951, Respondent entered into a written contract with W. G. Evans, whereby Evans agreed, as an independent contractor, to cut and log a certain tract of land in Murray County, Georgia, for $36.50 per thousand feet, and to deliver the lumber by truck to the Respondent. The contract (R. 22a-24a) provided that Evans would furnish all of his own tools, teams, equipment, supplies, trucks, and labor; that there would be no employer-employee relationship; that Evans was to be independent of any supervision by Respondent; and that Evans would commence operations promptly and finish them within a "reasonable time" estimated to require not more than six months.

During the bad weather of the winter, 1951-52, it became impracticable to log this particular tract (R. 24a, 50a, 70a), and Evans reported to Respondent's president that

the timber rights on the McBrayer tract, in Polk County, Tennessee, could be purchased. Respondent's president sent Respondent's timber cruiser to inspect and approve the tract (R. 70a, 71a). Respondent purchased the timber rights on the McBrayer tract (R. 91a-93a), and made the check for the purchase price payable to Evans because Respondent did not know the name of the grantor under the deed at that time (R. 29a, 52a, 70a, 71a). Respondent agreed that Evans might cut and log this tract under the terms of the written agreement of July 5, 1951, and transfer his operations back to the Murray County, Georgia, tract when the weather cleared up (R. 71a, 72a). It was agreed that the price to be paid Evans per thousand feet of lumber would be increased because of the longer haul from the McBrayer tract (R. 71a), and that, since there were no roads on the Tennessee tract, Respondent would use its bulldozer and equipment, operated by its employees, to build roads into the property (R. 72a). The principal roads were already in existence on the Georgia tract at the time the contract was entered into, this fact having been recited in the contract (R. 72a, 22a-24a).

Evans completed the cutting and logging on the McBrayer tract, and, when the weather had cleared up, returned to the Murray County, Georgia, tract, where he continued operations until May, 1952 (R. 20a). While he was delivering a load of lumber from the McBrayer tract to Respondent's lumber yard, the accident causing this lawsuit occurred (R. 14a).

Evans hired and fired his own employees, with no supervision from Respondent (R. 51a, 73a); Evans prescribed the hours of work for himself and his men with no control thereof on the part of Respondent (R. 53a, 73a); Evans chose what parts of the tract were to be logged first, and was not controlled by Respondent in the manner of

logging the tract (R. 52a, 73a); Evans picked the routes he followed in delivering the lumber from the tract to Respondent's yard (R. 78a); Evans furnished all of his tools, trucks, and equipment, with the exception of a temporary loan to Evans by Respondent of a power unit on an occasion when he tore up his own power unit (R. 52a, 72a).

In compliance with the provisions of the written contract of July 5, 1951, Respondent carried a Workmen's Compensation Insurance policy (R. 117a-119a) which also covered Evans' employees, and the premiums attributable to Evans' employees were charged by Respondent against Evans' account (R. 32a). The Tennessee endorsement to the insurance policy (R. 119a) required the employer, Respondent, to include the remuneration of all employees of W. G. Evans for the computation of the insurance premium. The officers of Respondent's corporation believed that they were required by law to carry such workmen's compensation coverage for Evans' employees account (R. 19a, 20a, 51a).

On five occasions over a nine months period (R. 95a-105a), at Evans' request, some of his truckers were paid direct by Respondent, as a matter of convenience, so that Evans would not have to receive the money from Respondent and then look these men up at their residences to pay them. All of these payments were charged against Evans' account (R. 19a, 20a, 51a).

A company affiliated with Respondent operated a commissary for the convenience of employees, neighbors, and pupils from nearby schools, at which Evans and some of his employees would trade from time to time. Any purchases at this commissary by Evans or his employees were charged to Evans' account (R. 72a, 73a, 36a-38a).

SUMMARY OF ARGUMENT.

I. THE QUESTIONS PRESENTED SHOW NO SPECIAL AND IMPORTANT REASON FOR GRANTING THE WRIT.

The basic question presented is whether or not the Respondent was entitled to a directed verdict in District Court on the ground that the truck driver causing petitioner's injuries was an independent contractor and not a servant of Respondent. This is not the kind of question contemplated by Rule 19 of the Revised Rules of the Supreme Court of the United States, which contemplates a review only for "special and important reasons." The other questions which the Petition purports to present have been resolved beyond doubt by previous decisions of the Supreme Court of the United States of America and the Supreme Court of Tennessee.

II. THE UNITED STATES COURT OF APPEALS DID NOT VIOLATE THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Since the adoption of Rule 50(b) of the Federal Rules of Civil Procedure, there has been no question but that the United States Court of Appeals has a right to review the proceedings in District Court, ascertain whether a motion for a directed verdict should have been granted, and if it was improperly refused and such motion was seasonably renewed after the verdict (as it was here), then reverse on the merits and remand with appropriate instructions. The previous cases requiring the granting of a new trial under the circumstances were distinguished after the adoption of this Rule of Civil Procedure; *Johnson vs. New York, N. H. and H. R. Co.*, 344 U. S. 48, 73 S. Ct. 125 (1952).

III. THE UNITED STATES COURT OF APPEALS CORRECTLY APPLIED TENNESSEE LAW.

The law applied by the United States Court of Appeals for the Sixth Circuit was the correct Tennessee law, as evidenced by specific decisions of the Tennessee Supreme Court; *Weeks vs. McConnell,* 196 Tenn. 110, 264 S. W. 2d 573 (1954); *Louisville and Nashville Railway Company vs. Cheatham,* 118 Tenn. 161 (1906). The fact that Kentucky cases also in point were cited by the Court of Appeals alters the case not at all.

IV. VERDICT WAS PROPERLY DIRECTED FOR RESPONDENT.

The United States Court of Appeals for the Sixth Circuit correctly stated that the "primary test as to whether a contractor is independent or a mere servant depends upon his right to control the manner and method in which the work he has undertaken to perform is carried on, independent of supervision and direction by his employer," correctly concluded that the contract and actions of the parties here clearly created an independent contractor relationship, and aptly remarked that "the cumulating of irrelevant and immaterial circumstances adds nothing to the argument that Evans was a servant of Conasauga. The total is no more than the sum of its parts."

ARGUMENT.

I. THE QUESTIONS PRESENTED SHOW NO SPECIAL AND IMPORTANT REASON FOR GRANTING THE WRIT.

Rule 19 of the Revised Rules of the Supreme Court of the United States provides, in part,

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The Rule then refers to certain specific types of cases as indicating the character of the reasons calling for review.

Although the Petition lists four questions as being presented for consideration, the only ultimate question is whether or not the Respondent was entitled to a directed verdict in District Court on the ground that the truck driver causing petitioners' injuries was an independent contractor and not a servant of Respondent. The question was thoroughly considered by the United States Court of Appeals for the Sixth Circuit, which delivered a unanimous opinion that such verdict should have been directed. We respectfully submit that this type question is not of the character contemplated by Rule 19 of the Revised Rules of the Supreme Court of the United States.

The other questions which the petition for writ of certiorari purports to present are present only because their names appear on the guest list. They were invited for their prestige but declined to appear. These other questions as to violation of the Seventh Amendment to the Constitution and failure of the United States Court of Appeals to apply Tennessee law are discussed fully below and shown to have been completely answered by previous decisions of this Court and the Supreme Court of Tennessee.

II. THE UNITED STATES COURT OF APPEALS DID NOT VIOLATE THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petition for writ of certiorari submits that the United States Court of Appeals for the Sixth Circuit violated the Seventh Amendment to the Constitution of the United States when it decided that the District Court should have directed a verdict for Respondent. Apparently petitioner submits two distinct lines of argument in support of this proposition:

1. That even if the Court of Appeals correctly decided that the District Court should have directed a verdict for Respondent, the correct remedy in the Court of Appeals was to order a new trial granted rather than to order a dismissal of the case as to Respondent;
2. That the Court of Appeals had no right to decide that a verdict should have been directed for Respondent.

In support of the first line of argument is cited the *Slocum* case; *Slocum vs. New York Life Insurance Company*, 228 U. S. 364 (1912). That case did hold that the Circuit Court of Appeals violated the Seventh Amendment to the Constitution of the United States when it reversed the District Court because of its failure to direct a verdict and remanded the case with directions to sustain the motion for a judgment notwithstanding the verdict. The Supreme Court held, in that case, that the proper procedure was to reverse with directions to the District Court to grant a new trial instead of granting a judgment for the defendant. The Supreme Court stated that at common law, under the circumstances of this case, the only remedy would have been to grant a new trial, and that the common law remedy was the only one available under the Seventh Amendment.

However, the *Slocum* holding became unimportant after the decision in the case of *Baltimore and Carolina Line, Inc. vs. Redman,* 295 U. S. 654 (1935), and the adoption of Rule 50(b) of the Federal Rules of Civil Procedure. In the *Redman* case the defendant moved for a directed verdict at the close of all proof and the court reserved its decision on this motion and submitted the case to the jury. After verdict for the defendant, the court denied the motion for a directed verdict and entered judgment for the plaintiff. On appeal, the Circuit Court of Appeals held that the evidence was insufficient to go to the jury and reversed, with directions to the District Court to grant a new trial. The defendant asked the Circuit Court of Appeals to direct the District Court to dismiss the case but the Circuit Court of Appeals held that the *Slocum* case controlled the remedy. Certiorari was granted by the Supreme Court of the United States, which held that the judgment of the Circuit Court of Appeals should be modified by substituting a direction to the District Court to dismiss the judgment on the merits rather than to grant a new trial. The Supreme Court distinguished the *Slocum* case, stating that at common law there was:

> "a well established practice of reserving questions of law arising during trial by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it the authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party, where the jury had given a verdict to the other, or making other essential adjustments."

Inasmuch as this practice was part of the common law at the time of the adoption of the Seventh Amendment, the

Supreme Court held that its use was proper and not a violation of the Seventh Amendment.

The distinction between the *Slocum* case and the *Redman* case was sharply defined in *Aetna Insurance Company vs. Kennedy*, 301 U. S. 389, 57 Sup. Ct. 809 (1937).

When the Advisory Committee on the Federal Rules of Civil Procedure considered the status of the law on this point, it concluded that the procedure dictated by the *Slocum* case was inefficient and wasteful, recognized that the *Redman* decision pointed to the method of correction, and recommended that the procedure approved by the *Redman* case be adopted as a general rule of civil procedure for all proceedings in Federal District Court (see the notes of Advisory Committee on Rules and Commentaries following Rule 50(b) of the Federal Rules of Civil Procedure, following Title 28, U. S. C. A.). This Rule of Civil Procedure provides:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied, or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict * * *."

Rule 50(b) of the Federal Rules of Civil Procedure was reviewed, explained, and approved, and its relationship to the *Slocum*, *Redman*, and *Aetna* cases analyzed by the United States Supreme Court in *Johnson vs. New York, N. H. & H. R. Company*, 344 U. S. 48, 73 Sup. Ct. 125 (1952).

This was the method of procedure adopted by the United States Court of Appeals for the Sixth Circuit in

this case when it reversed and remanded to the District Court, with instructions to dismiss the complaint, on the ground that verdicts should have been directed for the defendant. After the adoption of Rule 50(b) of the Federal Rules of Civil Procedure almost every Federal Reporter volume contains one or more instances of a United States Court of Appeals adopting the same remedy. Typical cases are:

Bell vs. Schoff, 81 F. 2d 909 (3rd Cir., 1936);
Burger vs. Callander, et al., 81 F. 2d 687 (3rd Cir., 1936);
Conway vs. O'Brien, 111 F. 2d 611 (2nd Cir., 1940);
Leader vs. Apex Hosiery Company, 108 F. 2d 71 (3rd Cir., 1939);
Massachusetts Protective Association, Inc. vs. Mouber, 110 F. 2d 203 (8th Cir., 1940);
Oelbermann, et al. vs. National City Bank of New York, 79 F. 2d 534 (2nd Cir., 1935).

The petition cites also *Tennant vs. Peoria and Pekin Union Railway Company*, 321 U. S. 29, 64 Sup. Ct. 409 (1944) (Petition, p. 10) and *Tompkins vs. Erie Railroad Company*, 98 F. 2d 49 (2d Cir., 1938) (Petition, p. 11), but neither of these cases involved a question of violation of the Seventh Amendment.

Tennant vs. Peoria and Pekin Union Railway Company, 321 U. S. 29, 64 Sup. Ct. 409 (1944) was an action under the Federal Employers Liability Act in which a verdict was returned for the plaintiff, and the Circuit Court of Appeals for the Seventh Circuit reversed and directed that a verdict be entered for the defendant. The United States Supreme Court reversed, not on the ground that there was a violation of the Seventh Amendment to the Constitution of the United States, but upon the ground that it would

have been improper to direct a verdict for the defendant under the proof presented. The Circuit Court of Appeals had concluded that there was negligence on the part of the defendant, but that there was not sufficient proof to show that this negligence caused the accident and death. The Supreme Court of the United States, with Mr. Chief Justice Stone and Mr. Justice Roberts dissenting, stated that the jury could properly have drawn inferences from the circumstantial evidence to sustain their verdict. Apparently this case was cited in support of the second line of argument referred to above—that the Court of Appeals had no right to decide that a verdict should have been directed for Respondent. But this is no Constitutional question, although so phrased in the Petition!

And even as a citation in support of this second line of argument, the *Tennant* case stands for nought when considered in conjunction with the unanimous opinion of the Supreme Court of the United States in *Chicago R. I. and P. R. Company vs. Bond*, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. Ed. 735 (1916). The *Tennant* case did not involve consideration of the distinction between servant and independent contractor. This was the question in the *Bond* case, also an action under the Federal Employers Liability Act, tried in the Oklahoma State Court, where a verdict for the plaintiff was affirmed by the Oklahoma Supreme Court. Supreme Court of the United States reversed the decision of the Oklahoma Supreme Court on the ground that the alleged employee was, as a matter of law, an independent contractor, and that a verdict should have been directed for the defendant for this reason.

In the *Bond* case, the alleged employee, one Turner, had a written contract with the defendant by the terms of which Turner was to perform certain work for the defendant Railroad Company. The contract of Turner in that

case was similar to the contract of Evans in the instant case in the following respects: Both Turner and Evans were to furnish all of the labor required; Turner was unloading coal for the railroad company; Evans was cutting lumber for the Respondent Company; the pay in both cases was on the basis of so much per unit of product measure; Turner assumed liability for death or injury of persons in his employ; Evans agreed to pay for workmen's compensation insurance to cover the same liability; both contracts expressed the intention to create an independent contractor relationship. In some respects the Turner contract did not indicate as strongly as the Evans contract that the relationship was to be that of an independent contractor. For example, Turner's contract was terminable by either party on fifteen days' notice; Evans' contract was terminable only by virtue of Evans' failure to comply with State and Federal laws. Turner's employer furnished the necessary tools, whereas Evans furnished his own.

In the *Bond* case there was testimony of the defendant's yard master to the effect that Turner was "under his supervision and control" and that he "directed him" what to do. But the United States Supreme Court disagreed with the Oklahoma Supreme Court on the construction to be placed on such testimony and said:

> "There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him * * * the power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees."

The only other authority cited in the petition for writ of certiorari in support of the statement that the United

States Court of Appeals for the Sixth Circuit violated the Seventh Amendment is *Tompkins vs. Erie Railroad Company*, 98 F. 2d 49 (2d Cir., 1938). This case did not involve any question of violation of the Seventh Amendment. Its only holding is that the law of the state where the accident occurred should be applied in ascertaining whether or not the defendant owed any duty to the plaintiff, who was a trespasser upon the defendant's property. When the Circuit Court of Appeals determined that no such duty existed under Pennsylvania law, it reversed the judgment for the plaintiff and remanded the case with direction to enter judgment for the defendant. It is an interesting sidelight that the Circuit Court of Appeals followed the very practice here which was condemned in the *Slocum* case, *supra*, and later approved by Rule 50(b) of the Federal Rules of Civil Procedure.

III. THE UNITED STATES COURT OF APPEALS CORRECTLY APPLIED TENNESSEE LAW.

The petition for writ of certiorari complains that the United States Court of Appeals for the Sixth Circuit failed to correctly apply Tennessee law to the case. As the opinion of the Court of Appeals (p. 5) in this case points out: "The law of Tennessee, which is applicable to the present contract, does not differ materially from general law." This quotation shows that the Court of Appeals fully recognized the applicability of Tennessee law, and the numerous cases treated in the next section of this brief (P. 21, et ff.) serve to document the conclusions of the Court of Appeals as to the Tennessee law applicable. All of this only points up the fact that the only real question involved in the petition is whether or not the Court of Appeals correctly held that Evans was an independent contractor and not a servant of Respondent.

This section of the brief will be confined to answering the specific complaints in the petition regarding alleged misapplication of Tennessee law by the Court of Appeals. The petition specifically complains, on page 16, that the Court of Appeals cited and used two Kentucky cases to overrule the Tennessee case of *Brademeyer vs. Chickasaw Building Company,* 190 Tenn. 239, 229 SW 2d 323 (1950). This was a workmen's compensation case, in which the lower court held that the alleged employee was an independent contractor, which holding was reversed by the Tennessee Supreme Court. It appeared that Brademeyer took over the window washing work on a building which had previously been done by a janitor employed by the building, on the basis of fifteen cents per window compensation. The contract of employment was oral and it was clear from the record that the employer had the right to discharge Brademeyer at any time and for any reason. Nothing was said as to the right of the employer to control Brademeyer's action. The employer paid Federal Social Security tax, withheld for Federal Income tax and carried Workmen's Compensation Insurance on Brademeyer. The Tennessee Supreme Court said, at page 325 (Southwestern Reporter):

> "* * * the carrying of such compensation on Mr. Brademeyer, the payment of the Federal Social Security tax on his employment, and the withholding from his earnings of an income tax, amount to at least some evidence that he occupied the status of an employee rather than that of an independent contractor * * *. The contract in the instant case was oral. The controlling facts are undisputed and clear. Therefore, whether the status of Brademeyer to Chickasaw was that of an employee within the meaning of the Workmen's Compensation Act, or that of an independent contractor, is a question of law."

This decision in no way conflicts with the holding of the United States Court of Appeals for the Sixth Circuit in the instant case. In fact, the Supreme Court of Tennessee thus upholds the action of the United States Court of Appeals in the instant case by its statement that the servant-independent contractor question becomes one of law when "the controlling facts are undisputed and clear."

The petition for writ of certiorari relies upon the statements in the *Brademeyer* case to the effect that the carrying of workmen's compensation insurance, the payment of Federal Social Security tax, and the withholding from earnings of income tax, amount to at least some evidence of an employee relationship rather than that of an independent contractor. In the instant case, the Respondent did not pay Federal Social Security tax on Evans; nor did it withhold from his earnings for income tax purposes. It did carry workmen's compensation insurance on Evans' employees, but this fact was stated by the Supreme Court of Tennessee, in a case decided subsequent to the *Brademeyer* case to be "without probative value" on the question of whether or not the status of the alleged employee amounted to that of an independent contractor; *Weeks vs. McConnell*, 196 Tenn. 110, 264 SW 2d 573 (1954). The full statement of the Supreme Court of Tennessee on this point is as follows, at page 575 (Southwestern Reporter):

> "Neither Social Security tax nor withholding tax was deducted from the earnings of McConnell. Premiums for workmen's compensation insurance on McConnell was paid, but this fact is without probative value on the question with which this case is concerned, because of the explanation (undisputed) as to the circumstances under which it was paid. Week's idea was that where a subcontractor of his did not carry workmen's compensation on the subcontractor's men, it became the obligation of Weeks to carry such in-

surance if he was to be protected. However, Weeks was under the impression that this risk extended likewise to a working sub-contractor. (He regarded McConnell as a sub-contractor.) It was under this impression that he paid the insurance premium for workmen's compensation on McConnell."

Inasmuch as in the instant case "neither Social Security tax nor withholding tax was deducted from the earnings of" Evans (R. 34a), and workmen's compensation insurance was carried on Evans' employees only because Respondent believed it was required by law and contract to do so (R. 29a-31a, 78a, 79a, 119a), we are unable to determine how the Supreme Court of Tennessee could have more clearly expounded the law of this case in accordance with the exact holding of the United States Court of Appeals. Besides, the circumstances in the instant case are even more strongly indicative of independent contractor relationship because Evans himself, rather than Respondent, bore the expense of the insurance premiums (R. 32a).

The petition for writ of certiorari (p. 13) refers to several Tennessee decisions that where employment is shown, the presumption obtains that the person doing the work is a servant, and that the burden then shifts to the employer to show that such person was an independent contractor. However, as the leading case cited in the petition points out:

> "Where the entire contract is in writing and is definite and unambiguous in its terms, or where the contract rests in parole and the facts are undisputed, the question of the relationship of the parties is one of law." *Mayberry vs. Bon-Air Chemical Company*, 160 Tenn. 459 (1929).

This was also the conclusion of the Supreme Court of Tennessee in *Brademeyer vs. Chickasaw Building Com-*

pany, 190 Tenn. 239, 229 SW 2d 323 (1950), cited at p. 16 of the petition for writ of certiorari. Other Tennessee cases to like effect are:

Texas Co. vs. Brice, 26 U. S. 640, 73 L. Ed. 555;

Knoxville Table & Chair Co. vs. Kerr Bros., 130 Tenn. 159 (1914);

Louisville and Nashville Railroad Company vs. Cheatham, 118 Tenn. 161 (1906);

Wilson vs. Memphis Publishing Co., 33 Tenn. App. 264, 231 SW 2d 404 (1950);

Howell vs. Shepherd, 196 SW 2d 849 (Tenn. Ct. of App., 1945; Cert. denied 1946);

American National Insurance Company vs. Poole, 24 Tenn. App. 596, 148 SW 2d 14 (1940);

Copeland vs. Cherry, 95 SW 2d 1275 (Tenn. App. 1936; Cert. denied 1936);

Grace vs. Louisville & N. R. Co., 19 Tenn. App. 382, 89 SW 2d 354 (1936).

The petition for writ of certiorari (pp. 15, 16) cites two cases for the proposition that if the employer has the right to terminate the employment at any time and for any reason, the relationship of master and servant is indicated; *Weeks vs. McConnell*, 196 Tenn. 110, 264 SW 2d 573 (1954), and *Bush Bros. and Company vs. Harold Hickey*, unreported decision of the United States Court of Appeals for the Sixth Circuit, filed June 17, 1955, copy of the opinion being attached to the petition for writ of certiorari. Both of these cases dealt with verbal agreements, and the proof in each case clearly showed the right to discharge the employee at any time for any reason. In the instant case, we are not considering an oral contract of employment capable of termination at any time and for any reason, but rather a written contract orally modified in two minor respects, the oral modifications being shown without dis-

pute, which could be terminated by Respondent "only upon receipt of information substantially indicating a failure by the party of the second part to comply with any and all state and Federal laws" (R. 22a-24a, 73a). The contract was to cover the logging operations upon a certain tract in the State of Georgia, and, by oral modification, a certain tract in the State of Tennessee. The written contract provided that Evans would finish the Georgia operation "within reasonable time" and, as the United States Court of Appeals for the Sixth Circuit points out in its opinion (p. 7), the "reasonable time" limitation would also be implied as to the Tennessee operations.

These facts in the instant case serve to distinguish *Bush Bros. and Company vs. Harold Hickey* and *Weeks vs. McConnell, supra,* which latter case the Supreme Court of Tennessee characterized as "a border-line decision." Also, it is to be noted that the United States Court of Appeals for the Sixth Circuit, in deciding the *Bush Bros.* case, *supra,* specifically refer to and distinguish the instant case, previously decided by the same court.

IV. VERDICT WAS PROPERLY DIRECTED FOR RESPONDENT.

A. Law Concerning Independent Contractor Relationship and Direction of Verdict.

The petition for writ of certiorari contends that a verdict for the Respondent should not have been directed, because Evans was an employee of the Respondent rather than an independent contractor. With few exceptions, the authorities presented in the petition are the same as those presented to the United States Court of Appeals for the Sixth Circuit. The following authorities sustain the action of the United States Court of Appeals for the Sixth Circuit:

Chicago R. I. & P. R. Co. vs. Bond, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. Ed. 735 (1916);

Texas Co. vs. Brice, 26 U. S. 640, 73 L. Ed. 555;

Knoxville Table & Chair Co. vs. Kerr Bros., 130 Tenn. 159 (1914);

Louisville and Nashville Railroad Company vs. Cheatham, 118 Tenn. 161 (1906);

Wilson vs. Memphis Publishing Co., 33 Tenn. App. 264, 231 S. W. 2d 404 (1950);

Howell vs. Shepherd, 196 S. W. 2d 849 (Tenn. Ct. of App., 1945; Cert. denied 1946);

American National Insurance Company vs. Poole, 24 Tenn. App. 596; 148 S. W. 2d 14 (1940);

Copeland vs. Cherry, 95 S. W. 2d 1275 (Tenn. App. 1936; Cert. denied 1936);

Grace vs. Louisville & N. R. Co., 19 Tenn. App. 382, 89 S. W. 2d 354 (1936);

J. L. Williams & Sons, Inc. vs. Hunter, 199 Ark. 391, 133 S. W. 2d 892 (1939);

Moore vs. Phillips, 197 Ark. 131, 120 S. W. 2d 722 (1938);

W. H. Moore Lumber Co. vs. Starrett, 170 Ark. 92, 279 S. W. 4 (1926);

General Refractories Co. vs. Mozier, 235 Ky. 252; 30 S. W. 2d 952 (1930);

Yellow Poplar Lumber Co. vs. Adkins, 221 Ky. 794, 299 S. W. 963 (1924);

Beck vs. Dubach Lumber Co., Lim., 171 La. 423, 131 So. 196 (1930);

McBride vs. Jerry Madden Shingle Co., 173 Mich. 248, 138 N. W. 1077 (1912);

Hutchinson-Moore Lumber Co. vs. Pittman, 154 Miss. 1, 122 So. 191 (1929);

Salmon vs. Kansas City, 241 Miss. 14, 145 S. W. 16 (1912);

Carter vs. The Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572 (1876);

Hopper vs. S. S. Ordway & Sons, 157 N. C. 125, 72 S. C. 839 (1911);

Gay vs. Roanoke R. & Lumber Co., 62 S. E. 435 (N. C. Sup. Ct., 1908);

Scales vs. First State Bank, 88 Ore. 490, 172 Pac. 499 (1918);

56 C. J. S. 53-55, Sec. 3(3).

The theory of derivative liability of an employer for acts of his employee is based upon the employer's actual control, or right to control, the employee's physical conduct in the performance of his work. The employer is held liable for his servant's torts in the scope of his employment only because of the employer's right to control the manner of doing the very thing which causes injury to the third person.

56 C. J. S. 53-55, Sec. 3(3):

"It has been variously held that *control as to the manner, mode, and detail of the work* is the main, essential, and decisive question; the chief and distinguishing criterion; the prime, decisive, determining and most important factor; the chief and controlling consideration; the most important element; the real test; and, likewise, such control has been held to be the essential, important, principal, primary, ultimate, basic, vital, supreme, decisive, and controlling test * * * the employer must have control over the *physical conduct* of the employee in the performance of the work *and in applying the test for purposes of tort liability, it should be directed to the particular factor or matter on which liability is sought to be established.*" (Italics added.)

The distinction between servant and independent contractor is of vital importance to the average business concern, not only because of the prospective tort liability, but also because the employer must be able to know *in advance* whether or not he is obligated to withhold income taxes, to deduct social security payments, etc. The attorney should be able to draft a contract for his client and advise him that if the provisions of the contract are adhered to, the person employed will be an independent contractor, and not a servant. It is hard to conceive how a contract could have been more scrupulously drafted to create an independent contractor relationship and how the contract provisions could have been more closely adhered to than in the instant case.

The undisputed proof shows that, at the time of the accident, W. G. Evans was driving a truck which he owned (R. 49a, 121a), and which was registered in his name (R. 89a), along a route which he chose (R. 73a), at a time of his own choosing (R. 53a, 73a), delivering lumber to Respondent pursuant to the terms of a written contract which referred to Evans as an independent contractor and spelled out in detail the relationship of independent contractor (R. 22a-24a).

B. Consideration of Specific Authorities.

The operations involved in this case were cutting, sawing, and delivering lumber. All testimony shows, without dispute, that Conasauga River Lumber Company never attempted to control the manner and means of these operations, never told Evans whom he should hire or fire, when or how he or his employees should work, what routes to take to the company, how large a force to employ, etc. (R. 52a, 53a, 61a, 68a, 72a, 73a). The cases below, from Tennessee and other jurisdictions, involve similar facts

where the Courts have held, as a matter of law, that the contract was that of independent contractor, rather than that of servant and master.

In *Louisville & Nashville Railway Company vs. Cheatham*, 118 Tenn. 161 (1906), the trial judge had held that a construction company employed by the defendant Railroad Company was not an independent contractor. The Supreme Court of Tennessee reversed. The written contract provided that the railroad engineer could alter the location and plan of the work, decide on the quantity and quality of work; that the contractors would indemnify the railroad against claims for damages done by the contractors or subcontractors; that the railroad engineer could determine the number of workmen to be employed; that the work was subject to the railroad engineer's direction and inspection; that the railroad would furnish rails, supplies, switches, etc.

The Court said:

"We are of opinion the fact that the contract provides that the work is to be done to the satisfaction of the railroad engineer and according to the specifications and such explanatory drawings and instructions as may from time to time be furnished by said engineer does not affect the question of independent contractor. The company had a right to protect itself in this manner, *but the mode of doing the work is left to be pursued independently* by the contractors.

* * * * *

"This provision, it will be observed, is in reference to the location, grade, dimensions of the work, etc., which the contract makes subject to any alteration that may be required by the engineer, but *does not touch the mode or manner of doing the work*, which is left to the contractor.

"* * * A partial reservation or control in certain respects does not transform a contractor into a mere servant." (Italics added.)

In *Grace vs. Louisville and N. R. Company*, 19 Tenn. App. 382, 89 S. W. 2d 364 (1936), the plaintiff sued the railroad for damages for negligence of the driver of a truck belonging to the Lasley-Bass Transfer Company, on the theory that the transfer company was agent of the railroad. The trial judge sustained the railroad's motion for directed verdict, and this was affirmed on appeal.

The transfer company had a written contract with the defendant by the terms of which it picked up and delivered, collected freight charges, gave receipts, accounted for the monies, and delivered to the railroad the freight bills and orders. It covenanted to save harmless the railroad from all loss or damage on account of injury to any person by reason of negligence of the transfer company's employees. The railroad was authorized to procure public liability insurance on all of the transfer company's vehicles, the premiums to be paid by the transfer company. The contract expressly stipulated that it was the intention of the parties that the transfer company would be an independent contractor. The railroad reserved the right to terminate the contract for any of several reasons. Portions of the Opinion are quoted:

"* * * The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission *at the very instant of the act* or neglect.

"* * * As a practical proposition, every contract for work to be done reserves to the employer a certain degree of control. * * * The control of the work reserved in the employer which makes the employee a mere servant is a control, not only of the result of

the work, but also of the means and manner of the performance thereof; * * *"

* * * * *

"The contract sets forth the whole plan of service, with many details; but the details are of results accruing to the carrier and not details of operation to accomplish those results. *There was no reservation of right to tell the transfer company what kind of trucks to use or what servants to employ, or the size of a load, or how to box and crate the freight, or what streets to travel*—only at last getting and delivering the freight to or from the carrier's depot, collecting the charges, and accounting for them.

"* * * *We do not construe the requirement of liability insurance to protect the carrier as an admission that it might be liable in such case as this.* It was evidently made out of abundant caution." (Italics added.)

In *Copeland vs. Cherry,* 95 S. W. 2d 1275 (Tenn. Ct. of App. 1936; Cert. denied 1936): The plaintiff sued for personal injuries, the defendant being the Menassa Timber Company and Pierce Cherry, alleged to be an agent of the defendant timber company. The Court held that the relationship of independent contractor existed, and this was affirmed on appeal.

The timber company entered into a verbal contract with Cherry, which was confirmed by letter as follows: Cherry to set up his mill on lands on which defendant had purchased all of the timber; Cherry to saw lumber in accordance with specifications furnished by defendant; Cherry to consult with the local representative of the defendant in connection with the manufacture of lumber, and handle to conclusion in line with the result of such consultation and instructions; the price to be $5.00 per thousand board measure; Cherry to pile all the lumber

subject to the instructions of the defendant representative; the defendant to have the right to make changes in the specifications as regards to lengths and widths. Portions of the opinion follow:

> "* * * Taking the evidence as a whole, *especially in view of the written evidence of the contract,* we are of the opinion that Cherry was an independent contractor. There is no relevant evidence that the company retained the right to control the operation of the mill or to control Cherry while he was operating the mill. The timber company was merely interested in obtaining the lumber after it was sawed in accordance with the specifications. Cherry received $5.00 per thousand feet to saw the timber into lumber, and he employed his own hands and paid them. The timber company had no right to control the operation of the mill." (Emphasis added)

J. L. Williams & Sons, Inc. vs. Hunter, 199 Ark. 391, 133 S. W. 2d 892 (1939):

> "* * * Appellee, alleging that while employed by J. L. Williams & Sons as a log cutter he received personal injuries, seeks compensation upon the theory that a fellow servant's negligence was the proximate cause.
>
> "* * * appellant's request for an instructed verdict should have been given * * * because appellee was a servant of Z. T. Allen, a contractor independently employed by appellant * * *.
>
> "Transactions relied upon by appellee to prove (1) that Allen was not an independent contractor, and (2) that if such relationship originally existed it was destroyed insofar as appellee is concerned by conduct of appellant and its agents, are that Tom Allen (appellant's woods foreman and a brother of Z. T. Allen) told workers what lengths logs were to be cut. * * * that a company employee scaled the logs; that if Tom Allen were in the woods he would tell workers what

size timber should measure at the stump; also, he would direct them how to care for the small growth. * * *

* * * * *

"* * * Z. T. Allen testified to a contract with appellant, made through Tom Allen. Logs were to be delivered on skidway for $7.50 per thousand feet. Allen furnished his own trucks and other equipment and employed his own men—'I just worked under a contract to put the logs to the mill at that price.' Witness had done contract work of a similar nature for others. He employed appellee and Wilson, but arranged through the Williams Company to get advances—'I made arrangements with the bookkeeper to pay these saw hands when their time came through so I would not have to keep up with it. They got groceries at the commissary regularly and (the amounts paid appellee and Wilson) were deducted (in arriving at the balance due me by appellant).'

"Allen also testified that *the men were paid by appellant's bookkeeper* or cashier, but that *such payments were charged to his logging account.*

"* * * Tom Allen admitted having told different groups of loggers that the *wage and hour law had been enacted by congress, and says he told the contractors they would be expected to comply with its terms.* He insisted, however, that he was not talking with or addressing the men other than by way of information.

"* * * *Payment at the commissary, or by appellant, in the manner described* by appellant's bookkeeper and concurred in by appellee, *was not inconsistent with Allen's contract* to deliver logs at $7.50 per thousand feet. Credit at the commissary was a matter of mutual convenience.

* * * * *

"* * * For the error heretofore mentioned the judgment is reversed and the cause dismissed." (Emphasis added)

General Refractories Co. vs. Mozier, 235 Ky. 242, 30 S. W. 2d (1930): Defendant manufactured clay products and contracted with Nolan to mine and haul clay to defendant. Defendant furnished the timber and tracking. Nolan sold his contract to Middleton and Binion, who, with defendant's consent, took their contract on the same terms.

Plaintiff was injured by reason of operations of Middleton and Binion and recovered a jury verdict. This was reversed on the ground they were independent contractors.

The Court said:

"* * * Middleton and Binion worked as they pleased and quit when they pleased. No one directed them in their work. *They hired help as they pleased and paid their own hands by reporting the amounts to the company, which paid the hands by deducting these amounts from what was coming to Middleton and Binion* on the clay they delivered at the tipple at $1.25 a ton. *The men that Middleton and Binion hired signed the company's workmen's compensation register.* They had worked for the company before and did not sign a new card.

* * * * *

"* * * The fact that the men employed signed the workmen's compensation register is not controlling."

W. H. Moore Lumber Co. vs. Starrett, 170 Ark. 92, 279 S. W. 4 (1926): Starrett sued W. H. Moore Lumber Company and W. M. Fleetwood for injuries from a sawmill operation. The company alleged that Fleetwood was an independent contractor. Verdict for the plaintiff was reversed on appeal.

The written contract provided that Fleetwood would use the company's sawmill to convert timber on the company's lands into lumber for $10 per thousand feet; that Fleetwood would indemnify the company against labor claims; that Fleetwood would purchase of the company certain teams, wagons, and harness for use on the job by letting the company deduct $1.00 per thousand feet, and the company retained a lien to secure the purchase price. The company gave instructions about how the lumber should be cut and selected the men who scaled the logs. Fleetwood hired, fired, and directed his own employees, and paid them with money furnished by the company and credited to Fleetwood's account. The company charged against Fleetwood's accounts whatever he took out of the company commissary. The company purchased two saws for Fleetwood. When Fleetwood left, the company took back the wagons and teams and sold them.

The Court stated that the proof showed the company was interested only in the results of the work and that none of the factors referred to were inconsistent with the independent relationship of Fleetwood.

Hutchinson-Moore Lumber Co. vs. Pittman, 154 Miss. 1, 122 So. 191 (1929): Appellee brought this action against appellant, Magee, and Hickman, for damages for an injury. Trial resulted in a directed verdict in favor of Hickman, and in a verdict and judgment against appellant and Jack Magee. Judgment against appellant was reversed on appeal, on the ground that Magee was an independent contractor.

There was a written contract which provided: that Magee would saw the timber on the company's land into logs in lengths to be designated by the company from time to time, for 95¢ per thousand board feet; that Magee would indemnify the company against all damages to any other

person; if Magee should not cut logs fast enough and in sufficient quantities, then the company should have the option of cancelling this contract, or of entering the land and cutting such additional timber as might be necessary so that its mill could be operated at its maximum capacity, at the expense of Magee; Magee should be governed at all times by instructions from the company as to where timber should be cut and the sequence in which governmental subdivisions should be entered. Appellee and his co-employee witnesses admitted, on cross examination, that they were employed by Griffin (Magee's assignee) alone, and the undisputed evidence was that it was Griffin who paid and had the right to discharge employees and that the only supervision or control appellant undertook to exercise over the work was through Hickman, its woods superintendent; and that such supervision and control consisted solely of directions looking to the carrying out of the contract between appellant and Magee, and not to the method or manner of carrying out the contract. They testified that Hickman gave instructions as to the order in which the trees should be cut from the different governmental subdivisions of the land, how high from the ground they should be cut, and what lengths and sizes they should be.

The Court said that appellee's contention that the contract should not be regarded in determining the relationship existing between appellant and Magee because, by its terms, no time was fixed for its completion, is without merit, for the contract plainly provides that Magee was to cut and deliver to appellant at its logging road all the merchantable timber from the lands specifically described in the contract.

"* * * *The contract between appellant and Magee fixed the relationship between the latter and the former,* and that relationship was not one of master and serv-

ant, but instead, under the plain provisions of the contract, Magee was an independent contractor. *By the terms of the contract, Magee obligated himself alone to bring about certain net results. The method or manner of bringing about such results were by the contract, left solely with Magee.* * * * Magee undertook by his contract with appellant to deliver logs convenient for loading on appellant's logging cars. That was one of the results appellant contracted for. *Appellant had nothing to do either with the manner of hauling the logs out of the woods, or preparing the loading ground for their reception.*" (Italics added.)

Moore vs. Phillips, 197 Ark. 131, 120 S. W. 2d 722 (1938): Judgments were returned on jury verdicts against Arthur Moore, Allen King, and Chicago Mill & Lumber Company. On appeal the judgment against the company was reversed, on the ground that Moore was an independent contractor. The three plaintiffs were in an automobile which collided with a truck belonging to Moore and driven by King.

The company purchased the standing timber on 340 acres of land and entered into a written contract with Moore under which, for a compensation of $10 per thousand feet, Moore agreed to cut, transport and deliver the standing timber. Original ledger sheets, showing the account of Moore with the company were introduced in evidence. Moore owned a truck and trailer, although the company had advanced him some money and taken a mortgage; he took with him laborers then regularly in his employ, and at a later date hired log laborers, some of whom were employed by him to cut timber "by the thousand." He also employed persons owning trucks to transport the timber to Monticello. Moore paid his own labor up to June, 1937, but thereafter, laborers were paid by

the "woods foreman" of the company, Cox, on payrolls made out by Moore.

The contract between Moore and the company provided that Moore would furnish his own logging equipment, labor, etc.; that Moore would confine operations to such subdivisions as the corporation should direct, and would begin operations where directed; that the corporation retained the power to direct as to the species to be cut; that the company could direct the manner in which the timber should be cut; that the company could retain 10% of the contract price until the contract was completely performed; that the company might discontinue cutting and delivery of the timber.

"By a long line of decision this court is committed to the universal rule, that where the contractor is to produce a certain result, according to specific and definite contractual directions, agreed upon and made a part of the contract, and the duty of the contractor is to produce the net result by means and methods of his own choice, *and the owner is not concerned with the physical conduct of either the contractor or his employees,* then the contract does not create the relation of master and servant. This court has consistently accepted and stated the settled rule that *even though control and direction be retained by the owner, the relation of master and servant is not thereby created unless such control and direction relate to the physical conduct of the contractor in the performance of the work with respect to the details thereof.* * * *

"* * * There is nothing in the contract showing an intent upon the part of the company to retain control or direction of Moore in the exercise of the means or method by which he should perform the contract. *There is no direction relating to the physical conduct of Moore, or his employees, in the execution of such contract.* True it is there are certain directions to be

observed by the contractor in the cutting of the timber, especially as to place and dimension; but these are specific and definite and are similar to plans and specifications so often found in contracts covering the performance of labor of similar character. * * *

"* * * There are countless decisions of appellate courts construing stipulations in contracts, such as here involved, relating to the right of the owner 'to give directions.' In all of the cases examined, some of which are cited, it is held that such phrases do not relate to the method or manner and do not govern the details or the physical means by which the work is to be performed. The Supreme Court of the United States has so held in two cases directly in point. *Casement vs. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; *U. S. vs. Driscoll*, 96 U. S. 421, 24 L. Ed. 847.

"* * * '*The fact that the company pays the employees of the contractor directly* in order to protect itself against mechanic's liens, *does not destroy the independent character of such an employment* * * *'

"In *Pine Woods Lumber Co. vs. Cheatham*, 186 Ark. 1060, 57 S. W. 2d 813, there was a verbal contract under which one Deckard agreed to cut and haul timber from certain lands to a named delivery point. Deckard was to furnish teams, equipment and laborers necessary to do the work. The trees were cut and sawed into logs of lengths 'as directed by the woods foreman.' *The owner's bookkeeper made out the payrolls, paid the laborers in cash, and charged the contractor's account.* Settlements were made on scale sheets and advances for fee bills were deducted. This court said: 'The testimony, in all essential parts, reflected, without substantial dispute, that Deckard was an independent contractor.'

"It is our view that the contract here involved created the relation of owner and contractor, rather than that of master and servant * * *.

"Is Plaintiffs' evidence sufficient to show that the company, by subsequent conduct, abandoned the relation of owner and contractor and created that of master and servant?"

The Court then quotes testimony that the company established credit for Moore with a merchant, paid the amounts charged by Moore, and charged these amounts to Moore's account with the company, that on several occasions the company's foreman told Moore's employees what lengths the logs should be cut and to keep the stumps low, the Court then concluding:

"* * * The Supreme Court of Wisconsin, in *Medford Lumber Co. vs. Mahner*, 197 Wis. 35, 221 N. W. 390, in a case similar in point of fact to the one at bar, said (p. 391): * * * 'There is no evidence that the company exercised the right to hire or discharge men, or to exercise any authority over the manner of performing the work.'

"* * * '*Some contention is made that the fact that the Medford Lumber Company paid the men employed by Mahner upon the presentation of a time order at the office justifies the conclusion that the men working under Mahner were really employees of the company.* Advancements are customarily made under such contracts as the work progresses. The lumber company was interested in seeing that the men who worked for Mahner received their pay; this to free its timber of log liens. Advancements made to Mahner in this way protected the company, and constituted a proper and businesslike method of handling the situation. *The method pursued cannot give rise to an inference, in view of the written contract, that the co-employees of Mahner were really the employees of the company.*" (Italics added.)

C. Consideration of Certain Factors Advanced by Petitioner as Indicating a Master-Servant Relationship.

The Petition's statement of the case (pp. 6-8) refers to certain isolated factors which the Court of Appeals dealt with in the following language (p. 7, Opinion, U. S. Ct. of App.): "The cumulating or irrelevant and immaterial circumstances adds nothing to the argument that Evans was a servant of Conasauga. The total is no more than the sum of its parts." The Petition contains no argument or authorities referring to any of these factors except for the provisions as to carrying of workmen's compensation insurance. The following serves to show the irrelevancy of these factors:

1. Workmen's Compensation Insurance.

Respondent deducted from the compensation due W. G. Evans premiums with which to pay for Workmen's Compensation Insurance covering also the employees of W. G. Evans. Petitioner contends that this was an indication of a master-servant relationship.

Tennessee Code, Sec. 6866, provides as follows:

"*Liability of principal or intermediate contractor for injuries; remedies against third person liable for the injuries; claim instituted against immediate employer; no waiver; place of accident.*—A principal, or intermediate contractor, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors and engaged upon the subject matter of the contract to the same extent as the immediate employer.

* * * * *

"This section shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work

or which are otherwise under his control or management."

This Tennessee Statute has been construed as follows:

Williams vs. Buchanan, 149 Tenn. 639 (1923), at p. 643:

"We think, under this section of the Act, principal contractors are made liable for injuries sustained by employees of subcontractors arising out of, and in the course of their employment, whether such subcontractor be independent contractors or otherwise. * * *"

It will be noticed also that the Tennessee endorsement to Respondent's Workmen's Compensation Policy (Pl. Ex. 12; R. 117a, 119a, 28a) required Respondent to collect insurance premiums from Evans, the sub-contractor. Thus Respondent was required to do exactly what it did, not only by *Tennessee Code*, Sec. 6866, but by virtue of the contractual obligation with its Workmen's Compensation Insurance Company.

Whether or not *Tennessee Code*, Sec. 6866, compelled Respondent to require coverage of Evans' employees to protect Respondent, Respondent certainly thought it did (R. 30a-31a). This was exactly the situation presented in *Weeks vs. McConnell*, 196 Tenn. 110, 264 S. W. 2d 573 (1954), where the Tennessee Supreme Court said that the fact Workmen's Compensation insurance covered the contractor's employees "is without probative value" in deciding between servant and independent contractor status.

Other decisions have uniformly held this factor does not change the independent contractor relationship.

Grace vs. Louisville & N. R. Co., 19 Tenn. App. 382, 89 S. W. 2d 354 (1936);

General Refractories Co. vs. Mozier, 235 Ky. 252, 30 S. W. 2d 952 (1930);

Raponi vs. Consolidated Coal Co., 224 Ky. 167, 5 S. W. 2d 1043;

Diamond Block Coal Co. vs. Sparks, 209 Ky. 73, 272 S. W. 31;

Harris vs. Stone, 256 Ky. 737, 77 S. W. 2d 18 (1934).

2. Purchase of the McBrayer Tract.

When the weather made it impracticable to complete work on the Georgia land, Evans located the McBrayer tract, in Tennessee, where operations could be conducted. He had no authority to secure rights to this tract for Respondent and therefore reported to Respondent that it could be bought. Respondent then sent its own employee to inspect the tract and determine whether it was suitable. The check in payment for the tract was made payable to Evans only because Conasauga River Lumber Company did not know the name of the owner of the property at that time (R. 29a, 52a, 70a, 71a). There is no control over the manner and means of Evans' logging operations implied in this situation, and therefore, no indication of master-servant relationship.

3. Payment by Respondent Direct to Evans' Employees.

The fact that on five occasions within a nine-months period (R. 95a-105a), some of Evans' employees were paid direct by Respondent was explained as a matter of convenience so that Evans would not have to receive the money from the company and then look up these men to pay them (R. 51a, 33a, 34a). The payments were charged against Evans' account (R. 95a-105a). The Courts have

held many times that payment in this manner does not constitute any indication of master-servant relationship.

J. L. Williams and Sons, Inc. vs. Hunter, 199 Ark. 391, 133 S. W. 2d 892 (1939);

Moore vs. Phillips, 197 Ark. 131, 120 S. W. 2d 722 (1938);

General Refractories Co. vs. Mozier, 235 Ky. 252, 30 S. W. 2d 952 (1930);

Scales vs. First State Bank, 88 Ore. 490, 182 Pac. 499 (1918).

4. Use by Evans of Respondent's Machinery.

The testimony showed, without dispute, that Evans used all of his own trucks, equipment, and machinery, with the exception that on one occasion he secured the temporary loan of a power unit for his sawmill, while his own burned out power unit was being repaired, and that on another occasion he purchased an old truck from Respondent and gave his note to Respondent as consideration (R. 52a, 72a, 20a, 42a). Neither of these transactions tend to show any control by Respondent over the manner and means of operations on the part of Evans.

W. H. Moore Lumber Co. vs. Starrett, 170 Ark. 92, 279 S. W. 4 (1926):

"Fleetwood also agreed to purchase of the company certain teams, wagons, and harness that were then being used at the mill, for which he agreed to pay the sum of $2,000.00, by permitting the company to deduct the sum of $1.00 per each thousand feet of logs scaled at each settlement period until the purchase price of $2,000.00 was paid.

"The company retained a lien upon the teams, wagons, and harness until the purchase price was paid * * *. As to wagons and teams sold Fleetwood

under the contract when Fleetwood left, under an agreement between them witness took the same back and sold them.

"Learned Counsel * * * contends that, because there is testimony * * * that the company, after the contract was executed and while Fleetwood was operating thereunder, bought new saws and built other parts to the sawmill and added a lathmill, this would warrant an inference the company was operating the sawmill, but this is not so * * *."

This same situation was involved in *Moore vs. Phillips*, 197 Ark. 131, 120 S. W. 2d 722 (1938), where the company advanced the contractor money to purchase a truck and took a mortgage to secure repayment. The Court held this did not alter the independent contractor status.

In *Louisville and Nashville R. R. Co. vs. Cheatham*, 118 Tenn. 161 (1906) the company furnished rails, supplies, etc., to the contractor, and yet the court found an independent contract as a matter of law.

5. Construction of Roads by Respondent.

The proof showed that logging roads had already been built to the Murray County, Georgia, tract, and when operations were transferred to the McBrayer tract it was necessary that Respondent construct roads thereto to make the timber accessible (R. 51a, 72a). Evans pointed out the spots he had selected for his mill set and the roads were constructed to these by the Company (R. 65a). There is here no indication of control by Respondent over Evans or his employees in the manner or method of their logging operations.

In *Hutchinson-Moore Lumber Company vs. Pittman*, 154 Miss. 1, 122 So. 191 (1929) the Court found an in-

dependent contractor status despite the right of the employer to designate the order in which the contractor should log the various portions of the tract, which goes much farther than is necessary in the instant case. To similar effect is *Moore vs. Phillips*, 197 Ark. 131, 120 S. W. 2d 722 (1938).

6. Specification of Sizes and Grades of Lumber.

The fact that Respondent could designate the sizes of the lumber which it wished delivered constituted simply specification as to results, not as to the manner or means of performance.

Louisville and Nashville Railroad Company vs. Cheatham, 118 Tenn. 161 (1906);

Grace vs. Louisville and N. R. Company, 19 Tenn. App. 382, 89 S. W. 2d 354 (1936);

Copeland vs. Cherry, 95 S. W. 2d 1275 (Tenn. App., 1936; Cert. denied 1936);

J. L. Williams and Sons, Inc. vs. Hunter, 199 Ark. 391, 133 S. W. 2d 892 (1939);

Moore vs. Phillips, 197 Ark. 131, 120 S. W. 2d 722 (1938);

W. H. Moore Lumber Co. vs. Starrett, 170 Ark. 92, 279 S. W. 4 (1926);

Pine Woods Lumber Co. vs. Cheatham, 186 Ark. 1060, 57 S. W. 2d 813;

Hutchinson-Moore Lumber Co. vs. Pittman, 154 Miss. 1, 122 So. 191 (1929).

7. Contract Requirement Regarding Social Security.

The requirement in the contract that Evans would take care of Social Security, minimum wage and Hour Law requirements, etc., is nothing more than a provision in writing to the effect that Evans should comply with the

law covering an independent contractor's duties; *J. L. Williams & Sons vs. Hunter*, 199 Ark. 391, 133 S. W. 2d 892 (1939).

CONCLUSION.

Respondent therefore submits that the petition for writ of certiorari and the motion for leave to proceed in forma pauperis should be denied.

Respectfully submitted,

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